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13 MILLENNIUM LABORATORIES, INC.

14 **UNITED STATES DISTRICT COURT**  
15 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

16 MILLENNIUM LABORATORIES,  
17 INC.,

18 Plaintiff,

19 v.

20 DARWIN SELECT INSURANCE  
21 COMPANY;

22 Defendant.

CASE NO. **'14CV0295 H BLM**

**COMPLAINT FOR BREACH OF  
CONTRACT AND BREACH OF THE  
COVENANT OF GOOD FAITH AND  
FAIR DEALING**

**Jury Trial Demanded**

23 Plaintiff Millennium Laboratories, Inc. ("Millennium") for its Complaint  
24 against Defendant Darwin Select Insurance Company ("Darwin") alleges as  
25 follows:

26 **SUMMARY**

27 1. Darwin issued an insurance policy to Millennium and has acknowledged that  
28 its defense coverage obligations under that policy were triggered by an underlying  
action filed against Millennium. The acknowledgement was issued under alleged  
reservation of rights, and promised that Darwin would fund Millennium's defense.  
Since then, Millennium has been submitting defense invoices to Darwin for the  
reimbursement that was promised (and is required by the policy). After issuing

COMPLAINT



1 reimbursement payments to Millennium for the first few submissions of invoices,  
2 without explanation Darwin stopped issuing any payments. Many months have  
3 now passed and Darwin has still failed to pay all but a small portion of the defense  
4 costs due. Meanwhile, Millennium's repeated inquiries with Defendants and  
5 demands for payment have simply been ignored. Thus, Millennium has been  
6 forced to file this lawsuit to enforce Darwin's defense coverage obligations.

### 7 **THE PARTIES**

8 2. Plaintiff Millennium Laboratories, Inc. is organized and existing under the  
9 laws of California, with principal offices located at 16981 Via Tazon, San Diego,  
10 California.

11 3. Plaintiff is informed and believes, and based thereon alleges, that Darwin is,  
12 and at all times relevant hereto was, incorporated under the laws of Arkansas and is  
13 headquartered in Farmington, Connecticut. Plaintiff also is informed and believes  
14 and based thereon alleges that Darwin is a commercial insurance company that  
15 does business throughout the United States, including in California.

16 4. Plaintiff is informed and believes, and based thereupon alleges, that at all  
17 pertinent times Darwin was doing business within San Diego County, California  
18 and was issuing policies covering activities within San Diego, California.

### 19 **JURISDICTION AND VENUE**

20 5. This Court has subject matter jurisdiction over this dispute pursuant to 28  
21 U.S.C. § 1332 because complete diversity exists between the parties and the total  
22 amount in controversy exceeds \$75,000, exclusive of costs.

23 6. Venue in this district is proper pursuant to 28 U.S.C. § 1391.

### 24 **GENERAL ALLEGATIONS**

25 7. As part of its overall business strategy and focus on good governance,  
26 Millennium has developed and maintained a comprehensive risk management  
27 program to protect itself against unanticipated exposures and losses. A key  
28 component of Millennium's risk strategy has been liability insurance. Millennium



1 has paid significant amounts in premiums to secure coverage for the liabilities it  
2 may face as a company doing business in the high-risk healthcare industry.

3 **A. Darwin's Insurance Policy**

4 8. Darwin issued to Millennium an insurance policy entitled "Miscellaneous  
5 Medical Facilities Professional, Employment Practices and General Liability  
6 Insurance Policy" with policy number 0305-0307 for the time period of at least  
7 December 1, 2011, to December 1, 2012 (the "Darwin Policy"). A true and correct  
8 copy of the Darwin Policy is attached hereto as **Exhibit A** and is fully incorporated  
9 by reference herein.

10 9. Millennium has fulfilled all relevant conditions, covenants and obligations  
11 under the Darwin Policy, including payment of all premiums due.

12 10. The Darwin Policy requires Darwin to defend Millennium against any claim  
13 that potentially triggers coverage under the policy, "even if the allegations of the  
14 Claim are groundless, false, or fraudulent."

15 11. Darwin's obligation to defend and to pay defense and supplemental  
16 expenses on Millennium's behalf is in addition to, and does not impair or exhaust,  
17 the limits of liability stated in the Darwin Policy. In insurance parlance it provides  
18 defense coverage "outside" of the policy limits (unless the policy limits have  
19 already been exhausted by indemnity coverage payments).

20 12. Millennium is informed and believes, and thereon alleges, that the limits of  
21 liability of the Darwin Policy have never been exhausted and, in all events, were  
22 not exhausted at the time that Millennium requested a defense for the underlying  
23 actions at issue.

24 13. The Darwin Policy is an enforceable contract.

25 **B. The Underlying Action And Request For Defense Coverage**

26 14. On or about June 18, 2012, Kelly Nelson ("Nelson") filed a lawsuit against  
27 Millennium and a Millennium employee, Jason Bristol, in a lawsuit captioned  
28 *Kelly Nelson v. Millennium Laboratories, et al.*, case no. 12-cv-1301, United States



1 District Court for the District of Arizona (the “Nelson Lawsuit”).

2 15. Millennium, through its broker, wrote to Darwin to request  
3 acknowledgement and payment of defense coverage for the Nelson Lawsuit under  
4 the Darwin Policy.

5 16. On November 20, 2012, Darwin and its affiliate Allied World Assurance  
6 Company (U.S.) Inc. (“AWAC”) responded to Millennium by letter. Darwin  
7 initially denied any coverage obligations pursuant to the Darwin Policy, claiming  
8 certain exclusions applied to bar coverage.

9 17. On May 16, 2013, counsel for Millennium challenged Darwin’s coverage  
10 denial by letter, and demanded that Darwin reconsider its defense coverage  
11 obligations.

12 18. On July 29, 2013, Darwin acknowledged its defense obligations for the  
13 Nelson Lawsuit under the Darwin Policy, starting from the inception of the Nelson  
14 Lawsuit.

15 19. Millennium retained defense counsel and has incurred very significant  
16 attorneys’ fees and expenses in defense of the Nelson Lawsuit.

17 20. Starting on January 4, 2013, on ten separate occasions Millennium has  
18 submitted defense costs invoices from the Nelson Lawsuit to Darwin for  
19 reimbursement.

20 21. Once the retention in the Darwin Policy was exhausted, Darwin started  
21 issuing reimbursement payments for some of the submitted defense costs.  
22 Millennium continues to incur defense costs because the Nelson Lawsuit is still  
23 pending and the defense is on-going.

24 22. However, the last defense payment for the Nelson Lawsuit was issued by  
25 Darwin on October 18, 2013, pertaining to an invoices submission on August 1,  
26 2013. There was a subsequent submission of invoices on August 29, 2013, and  
27 many invoices submitted thereafter. Darwin has not even responded to, let alone  
28 paid, any of those submissions.



23. As a result, Millennium has not received any reimbursement for the numerous defense costs invoices submitted to Darwin over the last 5 months.

24. On multiple occasions Millennium, through counsel, has followed up on Millennium's invoice submissions, inquiring as to the status of payment from Darwin. Darwin did not provide any substantive response to these inquiries.

25. To date, Darwin has reimbursed only a small portion of the reasonable and necessary defense costs Millennium has incurred and submitted to Darwin for the Nelson Lawsuit. The amount of Millennium's unreimbursed defense expenses far exceeds this court's jurisdictional minimum of \$75,000.

### **FIRST CAUSE OF ACTION**

#### **(Breach of Contract: Payment of Defense Coverage)**

26. Millennium incorporates and realleges the allegations of Paragraphs 1 through 25 above, as though fully set forth herein.

27. Millennium has satisfied all conditions for coverage under the Darwin Policy, and has incurred defense costs in the Nelson Lawsuit that exceed any applicable deductible or retention in the Darwin Policy.

28. Darwin has breached its defense obligations under the Darwin Policy and its obligations pursuant to its July 29, 2013 letter to Millennium, by failing to timely or fully reimburse Millennium's defense costs from the Nelson Lawsuit.

29. As a direct and proximate result of Darwin's breach of its obligations with respect to Millennium's defense in the Nelson Lawsuit, Millennium has sustained substantial losses, including the fees and expenses charged by defense counsel that Millennium has incurred in the Nelson Lawsuit, and interest thereon.

### **SECOND CAUSE OF ACTION**

#### **(Breach of Covenant of Good Faith and Fair Dealing)**

30. Millennium incorporates and realleges the allegations of Paragraphs 1 through 29 above, as though fully set forth herein.



1 31. Having acknowledged its defense obligations with respect to the Nelson  
2 Lawsuit, Darwin has acted without reasonable cause or excuse in failing to  
3 reimburse Millennium for the defense invoices it submitted.

4 32. In addition, Darwin breached the covenant of good faith and fair dealing  
5 implied in its policy by essentially ignoring Millennium's repeated attempts to  
6 obtain prompt payment of the owed defense costs. After making some initial  
7 payments, Darwin subsequently chose to ignore its further payment obligations,  
8 without grounds or excuse, and without even so much as informing Millennium of  
9 its plans. As a result, Millennium has received only a small portion of owed  
10 defense coverage from Darwin, and has been forced to sue in order to obtain the  
11 majority of defense costs for the Nelson Lawsuit that are past due and owing.  
12 Furthermore, even the few payments that Darwin did make were not timely, with  
13 Darwin taking multiple months to respond and issue payment. In short, despite  
14 Darwin's obligations and promises to provide an immediate and complete defense  
15 coverage, Darwin's acknowledgement of those obligations were just hollow words,  
16 and instead Millennium was all but abandoned by its insurer to fend for itself in the  
17 defense of the Nelson Lawsuit. In so doing, Darwin improperly and unreasonably  
18 placed its own financial interests ahead of the interests of the policyholder and its  
19 obligations to the policyholder.

20 33. As a proximate result of Darwin's misconduct, Millennium has been  
21 damaged as heretofore alleged, and has incurred substantial additional costs,  
22 including but not limited to its attorneys' fees, expenses and costs incurred in  
23 seeking to mitigate and remedy Darwin's breach of its defense payment obligations  
24 with respect to the Nelson Lawsuit. The full amount of such damages will be  
25 proven at trial.

26 34. As alleged herein, and especially as reflected by (1) Darwin's broken  
27 acknowledgement of defense coverage and agreement to pay and (2) Darwin's  
28 likely use of non-payment as retribution for Millennium's efforts to obtain



1 coverage from Darwin and its affiliate AWAC in other non-related matters,  
 2 Darwin's conduct with respect to Millennium was in willful and conscious  
 3 disregard of Millennium's rights and was undertaken with the intent to oppress and  
 4 cause injury to Millennium. Consequently, Millennium is entitled to recover, in  
 5 addition to actual damages, punitive damages both to punish Darwin for its  
 6 transgressions and to deter others from engaging in similar wrongful conduct.

### 7 **PRAYER FOR RELIEF**

8 WHEREFORE, Millennium prays for judgment against Darwin as follows:

#### 9 **On the First Cause of Action:**

- 10 1. Ordering and declaring that Darwin has an obligation to pay Millennium's
- 11 defense costs for the Nelson Lawsuit and has breached that obligation;
- 12 2. For a damages award of all of Millennium's unreimbursed defense costs for
- 13 the Nelson Lawsuit, and interest thereon;
- 14 3. For an order requiring Darwin to pay Millennium's future defense costs
- 15 within 30 days of submission to Darwin, with interest accruing thereafter;
- 16 4. For costs of this suit; and
- 17 5. For such other and further relief as the Court deems just and proper.

#### 18 **On the Second Cause of Action:**

- 19 1. Ordering and declaring that Darwin breached the covenant of good faith and
- 20 fair dealing in the Darwin Policy;
- 21 2. For a damages award of Millennium's attorneys' fees, costs and expenses in
- 22 this coverage lawsuit and any other legal fees and expenses incurred in obtaining
- 23 defense payments from Darwin in the Nelson Lawsuit, plus interest, and all
- 24 exemplary, punitive, consequential and/or extra-contractual damages available
- 25 under California law as relief for Darwin's unreasonable conduct and failure to act
- 26 in good faith; and
- 27 3. For such other and further relief as the Court deems just and proper.
- 28



1 Dated: February 7, 2014

ABELSON HERRON HALPERN LLP

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3 Vincent H. Herron

4 Anthony J. Matera

5 By s/ Marc D. Halpern

6 Marc D. Halpern

7 Attorneys for Plaintiff

8 MILLENNIUM LABORATORIES, INC.